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# Entertainment & Media

## FIVE THINGS TO CONSIDER BEFORE BRINGING A PROFITS OR OTHER CLAIM AGAINST A MAJOR STUDIO

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- 1 Pre-Litigation Audit**

As a litigator, I am often approached by the talent's transactional lawyer and asked to evaluate the talent's potential claims against a major studio. While many claims, e.g., vertical integration and first opportunity rights, are more contractual than accounting in nature, it almost always pays for the talent to do an audit of the participation statements and/or property in question before commencing litigation. Simply, you want to identify all possible claims upfront and claims uncovered in an audit can be an important part of the talent's case and litigation strategy. Since participation accounting is not based on GAAP, the auditor who is hired needs to specialize in participation accounting and know what to look for and where to look for it. Counsel should also consider whether the audit should be a "work product" audit, where the auditor is retained by counsel (it can be the transactional lawyer and/or the litigator), to preserve the confidentiality of communications with the auditor and possibly some or all of the audit results.
- 2 Contractual Limitations Period**

While the statutory limitations period in California for breach of a written contract is four years and for breach of an oral contract is two years, studios often place contractual provisions in their talent contracts that provide for a significantly shorter limitations period and/or set forth incontestability periods. Shorter limitations periods are generally valid under California law as long as the shorter contractual period is deemed reasonable and six month limitations periods have been found reasonable under certain circumstances. Therefore, litigation counsel needs to carefully examine the contract(s) for such provisions and analyze issues such as when the claim "accrued" as soon as he or she is retained. If necessary, tolling agreements should be entered into pre-litigation.
- 3 Mandatory Arbitration Provisions**

The studios are now adamant about including mandatory arbitration clauses, including designating their particular provider of choice, in their talent contracts. A recent survey we conducted with talent lawyers revealed that almost every major studio now designates JAMS as the provider in its talent contracts and that these clauses are presented to talent on a take it or leave it/non-negotiable basis. The studios are among the largest employers in California and many on the talent side believe that there may be a "repeat provider" effect favoring the major studios in such arbitrations. When we evaluate a claim pre-filing, we always look to see what the dispute resolution states, if there is an arbitration provision, if there are ways to challenge it and, if not, ways to at least mitigate some of its possible negative effects.
- 4 Careful Preparation and Attention to Detail**

Litigation between talent and a major studio, whether in a public court room or in an arbitration, is often very hard fought. This is due to a variety of reasons, including the sums of money involved and that the studio often wants to send a message to the broader talent community that it will be costly (financially and otherwise) to bring a claim against it. Because of this, it is especially important for litigation counsel (in conjunction with the talent's other representatives) to do a careful analysis of the contract(s), potential claims and the evidence (documentary and witness testimony), both for and against, to the extent possible prior to filing a claim. Only after this careful analysis is done can the client make an informed decision as to whether litigation and/or a pre-litigation settlement makes sense.
- 5 Developing a Story to Tell**

Particularly if the case will be heard by a jury, but also to some extent if it will be heard by a judge and/or an arbitrator, litigation counsel, should begin thinking even pre-litigation about a compelling narrative in support of the client's claim. Individual talent can often cast him or herself as the creator of the program in question and as a "David" against the studio's "Goliath." Studios, of course, have their own competing narratives, including that the talent has already been paid millions on the program, does not deserve more and that the studio took all of the financial risk. &